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92-977

Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEORGE LUDDINGTON,

Petitioner,

v.

INDIANA BELL TELEPHONE CO.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*John Moss, Jr.
156 E. Market, #200
Indianapolis, IN 46204
(317) 635-1945
*Counsel of Record for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Rights Act of 1991, 42 U.S.C. §1981 as amended, applies to cases which were pending, before the United States Courts of Appeals, but undecided, on the effective date of said Civil Rights Act, which cases were filed in the United States District Courts before June 15, 1989, the date on which this Court decided the case of Patterson v. McClean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989).

2. Whether Congress intended that certain portions of the Civil Rights Act of 1991 apply to cases that were pending and on-going when said Act became effective, particularly in light of Sections 109(c) and 402(b) of the Civil Rights Act of 1991.

3. Whether the Civil Rights Act of 1991, was intended as a curative act of the judicial interpretations placed on 42 U.S.C. §1981 and as such is retroactive.

PARTIES BELOW

The party Plaintiff below is Petitioner herein who is the named Plaintiff. Respondent was the Defendant below. The Appeal to the Seventh Circuit, and this Petition were filed on behalf of the named Plaintiff.

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THERE IS A CONFLICT AMONG HOLDINGS OF THE JUDICIAL CIRCUITS ON THE QUESTION OF WHETHER OR NOT THE CIVIL RIGHTS ACT OF 1991 APPLIES TO CASES THAT WERE PENDING AND ON GOING ON THE DATE THAT SAID ACT BECAME EFFECTIVE. SAID CONFLICT AMONG THE JUDICIAL CIRCUITS ON THE VITAL QUESTION OF NATIONAL CONCERN MUST BE RESOLVED BY THIS COURT.

TO CONFIRM THAT CONGRESS INTENDED THE CIVIL RIGHTS ACT TO APPLY TO CASES PENDING AND ON GOING ON THE EFFECTIVE DATE OF SAID ACT.

TO CONFIRM THAT THE CIVIL RIGHTS ACT OF 1991 CURES ANY DEFECT IN, OR ANY UNACCEPTABLE JUDI-

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PLACED ON 42 U.S.C. §1981.

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1B: The Civil Rights Act of 1991 was intended to overrule Patterson v. McClean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989.

1C: The United States Courts had jurisdiction over the Petitioner's 42 U.S.C. §1981 claims:

a. before Patterson, supra, was decided; and
b. after Patterson, supra, was overruled.

1D: The United States Congress intended for the Civil Rights Act of 1991 to have immediate application to all cases pending in Court, and on-going, when said Act became effective.

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No. _____

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OCTOBER TERM 1992

GEORGE LUDDINGTON,

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INDIANA BELL TELEPHONE CO.

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, George Luddington, respectively prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 15, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit holding that the 1991 Civil Rights Act does not apply to this case is reported Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, (7th Cir. 1992). The opinion is reproduced starting at page A-1 of the Appendix.

The United States District Court, Southern District of Indiana, Indianapolis Division, entered Memorandum Decisions. On April 23, 1990, the Court granted in part, and denied in Part Defendant's Motion for Summary Judgment. On February 1, 1991, the Court granted Defendant Summary Judgment. On May 10, 1991, the Court denied Plaintiff's Motion for a New Trial.

JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. §1254(1). The final judgment of the Court of Appeals was entered on September 4, 1992. This petition is presented within ninety (90) days from said final decision and invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Pertinent portions of the Civil Rights Act of 1991, Pub.L.No.102-166, 105 Stat-1071 pet app-pp-to Sect.1977 of the Revised Statutes 42 U.S.C. §1981 is reproduced at appendix pages

STATEMENT OF THE CASE

Background: The Petitioner's complaint in this case, filed November 4, 1986, alleged that Respondent engaged in discrimination against him in

employment, by (1)denying Petitioner promotions, (2) racial harassment, (3) and disparate treatment, because of Petitioner's race and because of Petitioners (i) prior EEO complaints against Respondent, and (ii) prior employment discrimination law suits filed against the Respondent.

Petitioner was employed by Respondent on the 28th day of January, 1966. He was paid on an hourly basis and classified as a craftsman. Petitioner's progress was noted as his job performance was consistently good to excellent. During his employment with Respondent, Petitioner obtained a BS degree from Purdue University in Engineering--Computer Science. Petitioner's applications for promotions to management-supervisory jobs were all denied. After Petitioner filed an em-

ployment discrimination suit based on race for denying promotions to him in 1979 in the United States District Court, Southern District of Indiana, Indianapolis Division, Petitioner was promoted to a level (1) supervisory position. Petitioner has not been promoted since that time.

In 1984, Petitioner was admitted to practice law in the State of Indiana, after graduating from Indiana School of Law, Indianapolis Division.

Between the years 1980-1986, Petitioner filed numerable applications for job promotions, no job promotion was awarded to Petitioner. Although Respondent Caucasian employees, who had less job experience and ability, and whose job performance appraisals and promotability grades were below Petitioner, were promoted; in addition

thereto, Respondent employees who had not protested Respondent's discriminatory practices based on race and retaliation, received job promotions preferable to Petitioner.

On the 23rd day of April, 1990, the Respondent's Motion for a Summary Judgment was granted in part and denied in part, the trial Judge held that with respect to certain "jobs", there were material issues of fact remaining for trial as to whether Respondent had discriminated against Petitioner in promotion. Respondent filed a Motion to Reconsider ruling on Motion for Summary Judgment.

On the 1st day of February, 1991, the Trial Judge reconsidered its prior Summary Judgment Ruling and granted summary judgment in Respondent's favor and dismissed Petitioner's

complaint. While this case was pending and on going before the Court of Appeals, the Congress passed and the President signed into law the Civil Rights Act of 1991. On June 15, 1992, the Court of Appeals for the Seventh Circuit affirmed the Trial Court's ruling and in doing so held that the Civil Rights Act of 1991 does not apply to this case.

Petitioner filed a Petition for Rehearing with suggestion of rehearing en banc. On September 4, 1992, the Court of Appeals denied said Petition for rehearing.

REASONS FOR GRANTING THE WRIT

There is a conflict among Holdings of the Judicial Circuits on the question "Does the Civil Rights Act of 1991 apply to cases that were pending and on going on the date that said Act

became effective.

The Fifth Circuit in Johnson v. Uncle Ben's Inc. No. 91-2590 (5th Cir. July 1, 1992); the Sixth Circuit in Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); the Seventh Circuit in Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir.1992), one Judge dissenting; the Eighth Circuit in Fray v. Omaha World Herald Company, 960 F.2d 1370 (8th Cir. 1992), all held that the 1991 Civil Rights Act does not apply to cases that were pending and on going on the date that said act became effective. The Ninth Circuit in Davis v. City & County of San Francisco (No. 91-15113) (9th Cir., Oct. 6, 1992) held that the Civil Rights Act of 1991 applies to litigation that was pending and on going on the effective date of said act. Said

Court held that:

> "...the language of the act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage."

The Ninth Circuit went on to say:

> "Section 402(a) of the new law states that '[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." By itself, this language does not determine whether the Act applies to ongoing cases, though it does give at least 'some indication that [Congress] believed that application of [the Act's] provisions was urgent.' However, two other sections of the Act reveal Congress' intent that the Act generally apply to pending litigation.
>
> Section 109(c) of the Act states that its extension of Title VII's protections to United States citizens working for American companies overseas 'shall not apply with respect to conduct occurring before the date of the enactment of this Act.' Section 402(b) declares, furthermore, that 'nothing in this Act shall apply to any disparate impact case for which

> a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.
>
> These directives from Congress that in two specific instances the Act not be applied to cases having to do with pre-Act conduct provide strong evidence of Congress' intent that the courts treat other provisions of the Act as relevant to such cases. '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citations omitted)

The conflict among the Judicial Circuits on the vital question of national concern must be resolved by this Court.

The Ninth Circuit case, Davis, supra, is the best reasoned case. It finds congressional intent that the 1991 Civil Rights Act apply to "cases pending" when said act became effective from the Act itself in the light of

long standing rules of statutory construction.

The above cited cases that are in conflict with Davis case supra, as pointed out in Davis, supra, either ignore, or show varying degrees of the lack of concern for the significance of Sections 109(c) and 402(b); and Rules of Statutory Construction are improperly applied.

The Civil Rights Act of 1991 cures any defects or unacceptable judicial interpretations placed on 42 U.S.C. §1981.

ARGUMENT

The decision of the Court of Appeals of June 15, 1992, is erroneous in that it is based on said Court of Appeals speculation that, slip op. pg.3:

> "President Bush would probably have vetoed a statute that contained an express provision for retroactivity"... but the Democratic majority in both houses would equally have 'vetoed' an express provision for

prospective application."

Either statement may or may not be true, we do not know. (slip op. pg 5) However, the statement leaves us in the political thicket. Judicial speculation over the wisdom of legislation may not serve as the basis for a judicial decision interpreting a statute.

Courts do not have the power and are not at liberty to determine the wisdom of a statute. Certainly then, no judicial decision should be based on what a Judge thinks that a legislature may have done, or may not have done, so long as the legislation is constitutional. The judiciary does not have the power to interfere with legislative functions. See McHard v. Louisville, (US S.Ct. 1902) 183 US 43; also see Sharpless v Mayor of Philadelphia, (S.Ct. PA.1853) found at 21 PA 147, 59

Am.Dec. 759.

The Court of Appeals statement that the decisions of the Supreme Court are in irreconcilable conflict on the question of whether a statute applies to cases pending on the effective date of the statute is not controlling. Congress expressed the clear intent that the 1991 Civil Rights Act apply to pending and on-going cases. Therefore, it is not necessary to resolve any conflict which may exist among decisions of this Court on said subject in order to determine congress-ional intent on the subject of the application of the Civil Rights Act of 1991, to cases that were pending on the date of said act.

The Court of Appeals appeared to reason that the Civil Rights Act of 1991 should have only prospective ap-

plication because the Defendant should not be subjected to a civil penalty for conduct that they had no reason to think unlawful is erroneous. Long before the passage of the Civil Rights Act of 1991, the Federal Statutes 42 U.S.C. §2000(e) et seq., and 42 U.S.C. §1981 and 42 U.S.C. §1983, made it unlawful to discriminate in employment practices against specified classes of people, including members of the black race.

The Court of Appeals recognizes (slip op. pg.6) that..."the 1991 Civil Rights Statute 'overruled' Patterson...other decisions that... congress believed had misinterpreted 42 U.S.C. §1981."

The Court of Appeals decision holds that 42 U.S.C. §1981, as amended by 1991 Civil Rights Act, should not be

applied retroactively because of the severity of the Civil penalty imposed by the 1991 Act. Said argument is erroneous, the amount of the possible damage award is not increased. Even during the brief period of Patterson, supra, an employer who discriminated in violation of 42 U.S.C. §1981 was exposed to general damages.

The instant case is anogalous to the Davis v. San Fransico, supra case, in the following respect:

a. The instant case was filed when this Court's ruling decisions held that 42 U.S.C. §1981 provided relief for all forms of employment discrimination based on race.

b. The Supreme Court subsequently handed down Patterson v. McClean, supra, in which said Court limited the application of 42 U.S.C.

§1981 to pre-contract employment decisions based on race.

c. Then Congress passed the Civil Rights Act of 1991, which overruled the Supreme Court's ruling in Patterson, supora.

In Davis v. San Fransico, supra, the matter of the application of the Civil Rights Act thereto evolved as follows:

In the instant case, the Court of Appeals for the Seventh Circuit erred by holding that the 1991 Civil Rights Act is not retroactive because said 1991 Act reflects policy and politics. The Court of Appeals said at page 6 of the Slip Opinion, as follows:

> "The new civil rights act reflects contemporary policy and politics, rather than a dispute between Congress and the Supreme Court over the mechanics of interpretation."

The Court of Appeals erred in

its reasoning that the 1991 Civil Rights Act is not retroactive because it would increase the liability of the employer who violates the law by discriminating against certain protected classes of employees. This is not so. The 1991 Civil Rights Act, §1977A Damages in cases of Intentional Discrimination in Employment, (b) compensatory and punitive damages (3) limitations, A-D, states as follows:

> "(a)Right of Recovery--(1) Civil Rights--In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5)...(3) Limitations--The sum of the amount of compensatory damages awarded under this section for future pecuniary losses...shall not exceed, for each complaint party:
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20

> or more calendar weeks in the current or preceding calendar year $100,000; and
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year $300,000."

The 1991 Civil Rights Act placed a ceiling on the amount of punitive damages and compensatory damages recovered under 42 U.S.C. §2000e(2), §2000e(3), et seq. However, prior to the passage of the Civil Rights Act of 1991, no ceiling was placed on the amount of punitive or compensatory damages that were available to an employee who had been the victim of discrimination in employment, in violation of 42 U.S.C. §1981.

In the case of Rowlett v.

Anheuser Busch, Inc., 832 F.2d 194 (1st Cir. 1987), a case brought pursuant to 42 U.S.C. §1981, the Jury awarded $3,000,000.00 in damages to a single Plaintiff. (remitter ordered)

In the case of Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987), a case brought pursuant to 42 u.S.C. §1981, the Jury awarded $150,000.00 in compensatory damages and $100,000.00 in punitive damages to a single Plaintiff (petitioner could not determine the number of persons employed by employer from reading said case.)

In the case of Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986), the Jury awarded $400,000.00 in in punitive damages.

Obviously, the portion of the Civil Rights Act of 1991, which appears

to limit damage exposure of the discriminating employer, is a benefit to said employer. This limit on liability may be likened to a situation in which a State passes an act which makes the imposition of the death penalty unlawful upon persons who had committed crimes that theretofore allowed the imposition of the death penalty.

The Court of Appeals, for the Seventh Circuit, argument (p.5, slip op.) that the 1991 Civil Rights Act should not be applied to cases pending when said act became effective because of the effect that such application would have is a matter for legislative wisdom and is beyond the scope of said Court's legitimate sphere of concern. This argument is not correct, by said argument, the Court wanders again into the legislative political thicket which

is "off-limits for the Judiciary"; it second guesses the wisdom of the legislature. Also, it tends to question the power of the legislature. Clearly, the Congress had the power to pass the 1991 Civil Rights Act. Also, Congress expressed it's intent within the contours of said act, that said act apply to cases which were pending and "on-going" at the time said act became effective. As a part of said act, Congress found that additional remedies are needed to deter unlawful harassment and intentional discrimination in the work place. Civil Rights Act, §2(1). Congress stated that legislation is necessary to provide additional protection against unlawful harassment and discrimination, Civil Rights Act, Section 2(3). The Court stated that the purpose of said act was to provide appro-

priate remedies for intentional discrimination and unlawful harassment in the work place. CRA, Section (1)...§3(4)to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination. With the Civil Rights Act of 1991, Congress expressed and presented the need and intended that the act apply to cases that were pending on the effective date thereon. Also, Sections 109(c) and 402(b), further confirm Congress' intent that certain portions of said act apply to cases which were pending on the effective date thereof.

In McFaddin v. Evans-Snider Buel Co., (1901 US S.Ct.) 185 US 505, 513, 513, in response to an argument opposing Congress' power to pass retrospective laws, this Court stated at page 512, 513:

> But we are of opinion that these objections are not well founded...What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct con-stitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. . . . Such acts are of a remedial nature, and are the peculiar subject of legislation. They are not liable to the imputation of being assumptions of judicial power.
>
> The power of a legislature to pass laws giving validity to past deeds which were before ineffectual is well settled."

Moreover, Congress has the power to pass legislation which cures any lack or irregularity or impotence in statutes that are then on the books. U.S. v. Heinszen & Co., 206 US 370, 387. The

Civil Rights Act of 1991 is a curative statute to 42 U.S.C. §1981 and as such, said Civil Rights Act applies to cases that were pending at the time said Act was passed. As stated in the Heinszen case supra, at page 387:

> "Nor is it important in any of the cases to which cures the irregularity, defect or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered." (citations omitted)

CONCLUSION

In conclusion, this Court should grant this Petition and issue a Writ to the United States Court of Appeals for the Seventh Circuit directing it to enter judgment that the Civil Rights Act of

1991 applies to this case, which was filed prior to June 15, 1989, the date of this Court's decision in Patterson v. McClean Credit Union, 109 S.Ct. 2363 (1989), which was pending and on-going on the date that the Civil Rights Act of 1991 became effective; and further, direct said Court to overrule the District Court's grant of Summary Judgment and return this case to the United States District Court for trial.

Respectfully submitted:

John Moss, Jr.
Attorney for Petitioner
156 E. Market, #200
Indianapolis, IN 46204
(317) 635-1945

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2320

GEORGE J. LUDDINGTON,

Plaintiff-Appellant,

v.

INDIANA BELL TELEPHONE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 86 C 1295—**John D. Tinder**, *Judge.*

ARGUED APRIL 6, 1992—DECIDED JUNE 15, 1992

Before POSNER and KANNE *Circuit Judges*, and BURNS, *Senior District Judge.**

POSNER, *Circuit Judge.* George Luddington has been employed by Indiana Bell since 1966. In 1979 he moved out of the worker ranks and into a bottom-rung management position, where he has been stuck ever since. Between 1982 and 1984 he applied for at least 35 other positions—most higher, some not—with the company. Turned down every time, in 1986 he filed this suit, which charges that every turndown precipitated four distinct statutory

* Hon. James M. Burns of the District of Oregon, sitting by designation.

violations, for a total of 140, because every one was both an act of racial discrimination and an act of retaliation for complaining about discrimination and each act violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which forbids racial discrimination in employment, and 42 U.S.C. § 1981, which entitles every person to the contractual rights of white persons. The district judge granted summary judgment for the company. While the appeal was awaiting argument, Congress enacted the Civil Rights Act of 1991, P.L. 102-166, which amended both statutes; and at our request the parties have briefed the significance of that enactment to the appeal. Some weeks ago another panel of this court, in agreement with the only other courts of appeals to have decided it, *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-98 (6th Cir. 1992); *Fray v. Omaha World Herald Co.*, No. 91-2439 (8th Cir. April 3, 1992), held that the Act is not to be applied retroactively. *Mozee v. American Commercial Marine Service Co.*, No. 90-2660 (7th Cir. May 7, 1991). In view of the importance of the question, we shall discuss it as if it were an open question in this circuit, rather than, as we would ordinarily do, dispose of it with a citation to our recent decision. But we can be brief.

Patterson v. McLean Credit Union, 491 U.S. 164 (1989), had interpreted the then section 1981 to exclude claims based on a refusal to promote or transfer an employee, unless the promotion or transfer could be said to create a new employment relation. The decision, applied as decisions normally (perhaps, after *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), always) are to pending as well as to new cases, wiped out many of Luddington's claims. The new civil rights act makes section 1981 expressly applicable to all racial discrimination in a contractual relation. 42 U.S.C. § 1981(b). If, as Luddington argues, the new act is retroactive, then some of the charges dismissed by the district judge must be reinstated. Of course, there is retroactivity and there is retroactivity. A statute could be applied (1) to cases filed and completed before the effective date of the statute that arise from

acts committed before that effective date, (2) to cases filed before the effective date of the statute, but not completed by that date, that arise from acts committed before that date, (3) to cases filed after the effective date that arise from acts committed before that date, (4) to cases in any of these categories but in which the conduct complained of straddles the effective date of the statute, or (5) only to cases filed after the effective date that arise from acts committed entirely after that date. The first four types of application would be retroactive to varying degrees; the fifth wouldn't be retroactive at all. Luddington's case is in cell (2) (*Mozee* likewise). It was filed, but not completed, before the effective date of the statute and it arises from conduct also committed before that date.

The new act provides, so far as bears on this case, that the amendments made by it "shall take effect upon enactment." This could mean no more than that employers were given no grace period in which to bring their practices into compliance with the requirements of the act; they must begin to comply, on pain of sanctions if they fail, on the day the act was passed. So interpreted the statute would be prospective. Or the language that we have quoted could mean that the requirements of the act apply to every undecided case—or perhaps to decided cases as well, which losing litigants could reopen to take advantage of the new act. The floor debates on the 1991 act reveal, as one would expect, divergent views on these questions. It seems futile to search for a legislative intent, bearing in mind that the President is by virtue of the veto power a key participant in the legislative process. President Bush would probably have vetoed a statute that contained an express provision for retroactivity—he had done so the previous session and his veto had not been overridden—but the Democratic majority in both houses would equally have "vetoed" an express provision for prospective application. As so often happens, the contenders could not agree, so they dumped the question into the judiciary's lap without guidance.

This politically convenient solution was facilitated by the fact that the courts do not have a consistent rule for deciding whether a statute shall be given retroactive, or merely prospective, effect when the statute does not say. Either of the contending factions in Congress could thus hope that statutory silence would work in its favor. In some cases, notably *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), the Supreme Court had announced a presumption that statutes are to be applied retroactively, at least in the sense of being applied to cases pending on the statute's effective date. In other cases it had said the opposite. Justice Scalia examined the two lines of cases in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (concurring opinion), and pronounced them "in irreconcilable contradiction." We agree. We too have straddled this divide. *Littlefield v. McGuffey*, 954 F.2d 1337, 1345 (7th Cir. 1992); *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir. 1991); *FDIC v. Wright*, 942 F.2d 1089, 1095 and n. 6 (7th Cir. 1991); *McKnight v. General Motors Corp.*, 908 F.2d 104, 110-11 (7th Cir. 1990).

The idea that the law should confine its prohibitions and regulations to future conduct, so that the persons subject to the law can conform their conduct to it and thus avoid being punished, whether criminally or civilly, for conduct that they had no reason to think unlawful, is a component of the traditional conception of the "rule of law." Except as codified in constitutional provisions (retroactive imposition of criminal penalties, for example, is forbidden by the ex post facto clause of the Constitution), the traditional conception is neither immutable nor absolute. But we think that conformity to it is the right policy for courts to follow in default of other guidance.

That brings us part of the way to resolution of the question whether the recent civil rights act should be applied prospectively only, but not all the way, because we are speaking only of a *presumption* against retroactive application. Procedural innovations not likely to bias decision systematically in favor of one litigant rather than

his opponent can, without serious affront to the values crystallized in the phrase "rule of law," be applied to cases pending when the innovations were adopted; and that is the norm even in criminal cases. *Dobbert v. Florida*, 432 U.S. 282 (1977); *Prater v. United States Parole Comm'n*, 802 F.2d 948, 953 (7th Cir. 1986) (en banc). In civil cases, the presumption against retroactive substantive lawmaking is actually reversed when the newly promulgated "law" is a judicial decision, whether overruling a previous decision or otherwise changing the settled course of the law. *Chowaniec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 131-32 (7th Cir. 1991); *NLRB v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990); *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1524 (7th Cir. 1989); *EEOC v. Vucitech*, 842 F.2d 936, 941 (7th Cir. 1988); *In re Resolution Trust Co.*, 888 F.2d 57, 58 (8th Cir. 1989). In reliance on this presumption—which the Supreme Court's recent decision in *Beam* may, as we noted, have rendered irrebuttable, although the absence of a majority opinion makes it more than usually difficult to construct the Court's holding—we held in *McKnight v. General Motors Corp.*, *supra*, 908 F.2d at 107, that *Patterson* should be applied retroactively. This result rested not on the fiction that judges find rather than make law but on such practical reasons as that otherwise litigants might lack adequate incentives to seek legal change through the courts and courts might feel too free to make such changes, because the costs in disturbance of expectations would be minimized by prospective application. Moreover, the power of a court to redistribute wealth and otherwise disturb settled expectations is held in check by the judicial tradition of incremental change and by the limited control that judges exercise over taxing and spending. A legislature has awesome power uncabined by a professional tradition of modesty and this power is held a little in check by the presumption that its handiwork is to be applied only to future conduct.

We might regard this as an exceptional case by pointing out that just as *Patterson* overruled or at least qual-

ified the decisions that had created the legal regime under which Luddington brought this suit back in 1986, so the 1991 civil rights statute "overruled" *Patterson* and several other decisions that a majority of the Congress believed had misinterpreted 42 U.S.C. § 1981. And we just said that prospective overruling is the norm. But it would be naive to suppose that Congress sits to review the interpretive soundness of judicial decisions. Congress is not a judicial body, let alone a body of academic commentators on judicial decisions. When it "overrules" a Supreme Court decision it is not registering disagreement with the merits of what the Court did; it is laying down a new rule of conduct—ordinarily for the future. Section 1981 dates back to 1866. It is as unlikely that Congress was attempting to restore section 1981 to the understanding of its framers as that *Patterson* in cutting back the earlier decisions had restored the statute to its original understanding. The new civil rights act reflects contemporary policy and politics, rather than a dispute between Congress and the Supreme Court over the mechanics of interpretation.

If the Civil Rights Act of 1991 made merely technical changes to the statute the presumption of prospective application would be rebutted. It does more. True, it does not prohibit any conduct not already prohibited by Title VII, except the practice of "race norming" (raising mean test scores of minority applicants to the mean of the majority). 42 U.S.C. § 2000e-2(*l*). It makes changes in remedies, procedures, and evidence. But such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes. Before the Act was passed—which is to say in the short-lived regime of the *Patterson* decision—a plaintiff in an employment discrimination case based on race could invoke section 1981 and thus obtain common law damages only if the discrimination took the form of refusal to hire in the first place or, if the plaintiff was already an employee, to promote into a new employment relation (such as associate to partner in a law firm). A discharge, or a refusal to make an ordinary promotion or a lateral transfer, was not covered;

a victim of discrimination in these forms was remitted to lesser remedies, those of Title VII. The new statute brings these acts under section 1981 and thus subjects employers to greater liabilities.

It could be argued that since the underlying norm of nondiscrimination was not new, employers should not be heard to complain that the norm has now been given teeth. But many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the ex post facto clause. *Miller v. Florida*, 482 U.S. 423 (1987); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 639 (7th Cir. 1990). The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change. That is the philosophy behind the ex post facto clause and also behind the interpretive principle that presumes that a new civil statute applies only to conduct that occurs after its effective date.

All this may seem rather hollow in a case such as this, where the change brought about by the new statute is a change back to the legal regime that existed when the defendant committed the acts for which it is being sued. *Patterson* was decided three years after the last act for which Luddington seeks to hold Indiana Bell liable. Indiana Bell had the same incentive to avoid racial discrimination back then as it does under the Civil Rights Act of 1991. Well, but not quite. The pre-*Patterson* "legal regime" to which we have referred was merely a set of lower-court decisions, constituting a stab in the dark concerning issues on which the Supreme Court had not yet ruled. It was a tentative regime, which *Patterson* swept away. And it would be a considerable paradox to hold that the older the conduct complained of, the more securely the conduct is subject to the new statute. The Civil Rights

Act of 1991 would be applied to racial discrimination committed before 1989, as well as to that committed since 1991, but racial discrimination committed between 1989 and 1991 would be subject to the more liberal (from a defendant's standpoint) regime of the *Patterson* decision. A jurisprudence of effective dates for the 1991 statute would be too complex to be worth elaborating and applying, especially when we consider the added costs of litigation that would be imposed. Here for example retroactive application of the 1991 statute would require us to remand a case already in its sixth year that has not been tried. Retroactive application across the board would produce massive dislocations in ongoing litigation and defeat substantial reliance interests of employers. Retroactive application carefully tailored to situations (quite possibly illustrated by this case) in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary. We hold that the new act is applicable only to conduct engaged in after the effective dates (plural because several sections carry different effective dates) in the act, at least if the suit had been brought before the effective date.

That knocks out many of Luddington's section 1981 claims but leaves all his Title VII claims unaffected. Indiana Bell, citing cases which hold that skeletal or perfunctory arguments do not preserve issues for appellate review, asks us not to reach the merits of those claims. It points out, in support of its request, that Luddington's brief does not specify which of the 140 claims presented to the district court he wants us to review, that the questions presented in his brief do not correspond to the questions actually argued in the brief, that the brief quotes a passage about civil rights which does not appear in the toxic-waste case that the brief cites as its source for the passage, and that the statement of facts contains virtually no references to the record.

Luddington filed a reply brief, but it contains no reply whatsoever to Indiana Bell's argument that his opening brief failed to preserve his claims for review by this court. Although we could search through the summary judgment

record—examine carefully all 140 claims, or 84 claims (4 × (35 - 14)), or some lesser number—and see whether we thought that any of them might have some merit that the district judge had overlooked, if we did this we would be stepping outside the proper judicial role in an adversarial system. This court is not equipped to act as auxiliary lawyer for a party to an appeal. The responsibility for the identification, framing, and argument of the issues on appeal is that of the lawyers, not that of the judges. If we assume the lawyers' responsibilities, we unbalance the market for legal services and take time away from our consideration and decision of other cases. So, if an appellant fails to make a minimally complete and comprehensible argument for each of his claims, he loses regardless of the merits of those claims as they might have appeared on a fuller presentation. *In re James Wilson Associates*, No. 91-1443, slip op. at 13 (7th Cir. May 22, 1992); *United States v. Harvey*, 959 F.2d 1371, 1376 (7th Cir. 1992); *Petrulis v. Commissioner*, 938 F.2d 78, 81 (7th Cir. 1991); *Hanrahan v. Thieret*, 933 F.2d 1328, 1335 n. 13 (7th Cir. 1991); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam); *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 536 (7th Cir. 1991); *United States v. Giovannetti*, 919 F.2d 1223, 1230 (7th Cir. 1990). At least this is true in civil cases, where there is no constitutional or other legal right to competent representation. We add, should anyone think us too quick to sacrifice substantive justice on the altar of administrative convenience and other bloodless institutional considerations, that a quick perusal of the record has brought to light no indications that the district judge committed any errors.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—6-15-92

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September 4, 1992

Before

HON. RICHARD A. POSNER, CIRCUIT JUDGE
HON. MICHAEL S. KANNE, CIRCUIT JUDGE
HON. JAMES M. BURNS,
SENIOR DISTRICT JUDGE*

No. 91-2320

GEORGE J. LUDDINGTON, Plaintiff-Appellant	Appeal from the United States District Court for the Southern District of Indiana Indianapolis Div.
v.	
INDIANA BELL TELEPHONE COMPANY, Defendant-Appellee.	No.86 C 1295 John D. Tinder Judge

ORDER

On July 13, 1992, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges** has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

*Hon. James Burns of District of Oregon, sitting by designation.

**Hon. Walter J. Cummings did not participate in the consideration of the suggestion for rehearing en banc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GEORGE J. LUDDINGTON, **Plaintiff,**	)	
v.	)	**IP 86-1295-C**
INDIANA BELL TELEPHONE **Defendant.**	)	

SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

This Court, having this day issued its Entry Regarding Defendant's And Plaintiff's Motions to Reconsider Entry Granting In Part and Denying In Part Defendant's Motion for Summary Judgment, now, therefore, and in accordance therewith,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff George J. Luddington take nothing by way of his complaint in the above captioned cause of action, and plaintiff Luddington's complaint is hereby dismissed as to all counts in favor of defendant Indiana Bell Telephone Co.

ALL OF WHICH IS ORDERED THIS 1st day of February 1991.

John Daniel Tinder, Judge
U.S. District Court

O.B. Vol. 37, page 88

The text of 1977 of the Civil Rights Act of 1991, (42 U.S.C. §1981) as amended, *subsection* (b) provides: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

The text of Civil Rights Act 1991, §1977A: Damages in cases of Intentional disrimination in employment, §3(a-d), "(3) Limitations--The sum of the amount of compensatory damages awarded under this section for further pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaint party--(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000; (B) in the case of respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year

$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year $300,000.

The text of Section 109(c), of the Civil Rights Act of 1991 states: (C) APPLICATION OF AMENDMENTS.--The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

The text of Section 2 of the Civil Rights Act of 1991 states--FINDINGS. The Congress finds that (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Suprme Court in Wards Cove Packing Co. V. Atonio, 490 US 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

The text of Section 3 of the Civil Rights Act of 1991 states--PURPOSES. The purposes of this Act are (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of "business necessity" and "job related" enunicated by the Supreme Court in Griggs v. Duke Power Co., 401 US 424 (1971) and in the other Supreme Court decisions prior to Wards

Cove Packing v. Atonio, 490 US 642 (1989); (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-977

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GEORGE LUDDINGTON,
Petitioner,

v.

INDIANA BELL TELEPHONE COMPANY, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT

GREGORY J. UTKEN *
BAKER & DANIELS
Suite 2700
300 N. Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300
Counsel for Respondent

* Counsel of Record

January 4, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-977

GEORGE LUDDINGTON,

Petitioner,

v.

INDIANA BELL TELEPHONE COMPANY, INCORPORATED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent, Indiana Bell Telephone Company ("IBT"),[1] asks this Court to deny George Luddington's ("Luddington") Petition for Writ of Certiorari for the reasons set forth herein.

COUNTERSTATEMENT OF THE CASE

At all times relevant to this case, Luddington was an employee of IBT. His lawsuit alleged that between 1982 and 1986 he pursued promotions or lateral transfers to various jobs and did not receive them or was not considered for them due to a) his race (black) and/or b) retaliation in violation of Title VII of The Civil Rights

[1] Indiana Bell Telephone Company, Incorporated, is a subsidiary of Ameritech Corporation.

Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* ("Title VII") and 42 U.S.C. § 1981 ("§ 1981"). The number of jobs at issue was 35.

The district court granted IBT's Motion for Summary Judgment on Luddington's claims under both Title VII and § 1981 as to each job. It dismissed all of the Title VII claims, as well as claims under § 1981 with respect to 26 of the jobs, on the merits. The district court dismissed the § 1981 claims on the remaining nine jobs on the basis of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding § 1981 covered only claims of discrimination in hiring or contracts that created a new and distinct employment relationship).

Luddington appealed to the Court of Appeals for the Seventh Circuit. While that appeal was pending, the Civil Rights Act of 1991 ("Act"), Pub. L. No. 102-166, 105 Stat. 1071 (1991), was enacted. Section 101 of the Act statutorily overturned the holding in *Patterson*. At the request of the court of appeals, the parties filed supplemental briefs on how the Act affected the appeal. Although the district court dismissed the § 1981 claims on nine of the jobs based on *Patterson*, Luddington had parallel Title VII claims for each of those nine jobs as well. The Title VII claims on four of these nine jobs had been dismissed on their merits. Because the same substantive principles apply under both Title VII and § 1981, *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 568 (7th Cir. 1989), the § 1981 claims on those four jobs also fail on the merits, regardless of *Patterson*. Thus, the Act's passage affected only the district court's ruling on § 1981 claims for five jobs.

The Seventh Circuit affirmed the grant of Summary Judgment to IBT on all of Luddington's claims and found that § 101 of the Act should not be applied retroactively. *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992).

SUMMARY OF ARGUMENT

Luddington seeks grant of certiorari claiming a conflict in the circuits on the issue of the Act's retroactivity. However, his arguments are not well-articulated, provide minimal analysis, do not provide a basis for granting the Petition or are incorrect.

Only § 101 of the Act was at issue in this case and no conflict exists among circuits on whether this section should apply to pending cases. All circuits that have examined § 101 have held that it should not be applied retroactively. The Court has already denied certiorari in a case where this was the issue.

While the Seventh and the Ninth Circuits differ on the principle to determine retroactivity (the latter finding the Act retroactive based on its language and the former finding the Act's language inconclusive and using judicial presumptions to find it not retroactive), the case holdings are not inconsistent as to the section of the Act at issue in each case. Under the Seventh Circuit's reasoning, substantive provisions of the Act are not to be applied retroactively, but non-substantive provisions can be applied retroactively. The section at issue in the Seventh Circuit [§ 101] is substantive, and the section at issue in the Ninth Circuit [§ 113] is not substantive.

Even assuming a conflict exists between the Seventh and the Ninth Circuits, the Court should deny the Petition because of the limited scope of this case. It involves only one section of the Act, and the case had already been adjudicated and was on appeal when the Act was enacted. The Act contains numerous sections, and many cases will involve situations where the cases had not been tried when the Act was enacted. Allowing one or more of the remaining circuits the opportunity to address the Act's retroactivity will permit greater illumination on that issue. If the Act's retroactivity is to be addressed by this Court, some case other than this one would be more appropriate for review.

REASONS FOR DENYING THE WRIT

I. LUDDINGTON'S ARGUMENTS ARE NOT CLEARLY ARTICULATED, ARE NOT A BASIS FOR GRANTING THE PETITION OR ARE INCORRECT.

Luddington seeks a grant of certiorari on the basis that a conflict exists in the circuits as to the Act's retroactivity. However, beyond that mere statement there is little analysis, nor is there clear or accurate substantive discussion as to why the Petition should be granted. Rule 24.6 of the Court states that briefs must be, *inter alia*, concise, logically arranged with proper headings and free from burdensome, irrelevant or immaterial matter. One might question whether the Petition meets these requirements.[2]

The Petition's Table of Contents lists three reasons for granting the Writ, only the first of which appears to be discussed in the Petition. Under "Argument," the Table of Contents lists four separate arguments, A through D. However, no such separate subheadings or arguments are in the Petition.

Luddington contends this case is analogous to *Davis v. City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), because his case was "filed when this Court's ruling decisions held 42 U.S.C. § 1981 provided relief for all forms of employment discrimination based on race"; "the Supreme Court subsequently handed down *Patterson v. McLean* . . . , limiting applications of § 1981 to pre-contract

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[2] The Petition seems to have some of the same failings the Seventh Circuit noted about Luddington's appellate brief. *Luddington*, 966 F.2d at 230 (The court refused to search the record to examine Luddington's claims to determine if they had merit, because to do so would require it to step outside the proper judicial role and act as an auxiliary lawyer for a party to an appeal. The court stated the responsibility for identification, framing and argument of issues was the lawyers', and when an appellant fails to make a minimally complete and comprehensible argument for each of his claims, he loses regardless of the merits of those claims.).

employment decisions based on race" and then Congress passed the Act which overruled *Patterson*. [Petition pp. 15-16.] These points are immaterial to *Davis* which did not involve any § 1981 issues but only the retroactivity of § 113 allowing recovery of expert witness fees under Title VII. Thus, the point of Luddington's analogy is not only unclear, but the analogy is wrong. Luddington proceeds to state that "in *Davis*, the matter of the application of the Civil Rights Act thereto evolved as follows" [Petition p. 16]; however, that thought is never completed, and he moves to a discussion of reasons the Seventh Circuit gave for holding the Act not retroactive.

In addition, Luddington cites arguments that have no bearing on the resolution of whether the Act is to be given retroactive application. For example, citing *McHard v. Louisville* (US S. Ct. 1902), 183 US 43 (*sic*),[3] he contends the judiciary does not have the power to interfere with legislative functions [Petition p. 12]. No one has disputed that point. He also cites *McFaddin v. Evans-Snider-Buel Co.*, 185 U.S. 502 (1902), for the proposition that Congress has the power to pass retroactive laws [Petition p. 22]. Again, no one disputes that point. The issue is did Congress pass a retroactive law, not can it do so. Finally, Luddington cites *United States v. Heinszen & Co.*, 206 U.S. 370 (1907), for the proposition that Congress has the power to pass legislation to cure any lack, irregularity or impotence of existing statutes [Petition p. 23]. Once again, no one disputes this point. In summary, none of these three arguments is relevant to the issue of whether the Act is to be given retroactive application and thus is not a basis to grant the Petition.

On multiple occasions, Luddington discusses the reasoning in his case with respect to penalties. He states that the Seventh Circuit concluded the Act should be applied only prospectively because a defendant should not be sub-

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[3] The correct citation is *McChord v. Louisville & Nashville R.R.*, 183 U.S. 483 (1902).

jected to a civil penalty for conduct it had no reason to believe unlawful before the Act. He contends this is in error because prior to the passage of the Act, other statutes had made it unlawful to discriminate in employment based on race [Petition pp. 13-14]. This misses the mark. The Seventh Circuit's point was that the Act's passage exposed employers to claims not previously cognizable under § 1981. *Luddington*, 966 F.2d at 229. Luddington also argues the Seventh Circuit's reasoning that the Act should not be applied retroactively due to the severity of penalties imposed is wrong because the Act did not increase the level of damages [Petition pp. 14-15]. This again misses the mark. The Seventh Circuit was not talking about liability in terms of dollar amounts, but liability in terms of expanded substantive coverage of the Act. *Id.*

Finally, Luddington argues that the Seventh Circuit erred in its reasoning because prior to the Act no limit on damages existed (citing damage awards in three 42 U.S.C. § 1981 decisions) and the Act put caps on the level of damages, which is favorable to employers [Petition pp. 19-20]. This statement is incorrect. Prior to the passage of the Act, no punitive or compensatory damages were available under Title VII. Since its passage, such damages are available under Title VII, but are capped depending on the size of the employer. However, both before and after the passage of the Act compensatory and punitive damages were available under § 1981. The Act did not limit or restrict recovery of damages under § 1981 and specifically so states [§ 102(b)(4)].

Thus, the Petition should be denied under Rule 14.5 of the Court for failure to present with accuracy and clearness what is essential to a ready and adequate understanding of the points requiring consideration.

II. NO CONFLICT EXISTS AMONG THE CIRCUITS AS TO WHETHER § 101 OF THE ACT SHOULD BE APPLIED RETROACTIVELY AND THE COURT ALREADY HAS DENIED CERTIORARI IN A CASE WHERE THAT WAS THE ISSUE.

In addition to the Seventh Circuit, five other circuit courts of appeal have specifically addressed whether § 101 of the Act should be applied to pending cases. All of these circuits concluded that it should not be applied retroactively. *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); and *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

Not only is there an absence of a conflict in the circuits as to whether § 101 should be applied retroactively, but this Court already has been presented with the opportunity to address that issue in the Seventh Circuit case that was the predecessor to *Luddington*. It declined to do so. *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992).[4] Because the issue in both cases is the same, the Court should deny this Petition as it did in *Mozee*.

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[4] The Court also has denied certiorari in another case involving the issue of the Act's retroactivity. *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992).

III. WHILE THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT DECISIONS DIFFER AS TO THE APPROPRIATE LEGAL PRINCIPLE TO APPLY IN DETERMINING THE ACT'S RETROACTIVITY, NO CONFLICT NECESSARILY EXISTS BETWEEN THEIR HOLDINGS AS TO THE PARTICULAR SECTIONS OF THE ACT AT ISSUE IN EACH CASE.

Luddington contends that the Seventh Circuit is in conflict with the Ninth Circuit's decision in *Davis*. The only provision of the Act involved in *Davis* was that allowing for the award of expert witness fees [§ 113]. The issue was whether that section could be applied to a case which had been tried and was pending appeal on the Act's date of enactment.[3] The Ninth Circuit found that the language of the Act made it clear the Act was to be applied to pending cases. *Davis*, 976 F.2d at 1550. While this conclusion differs with that of the Seventh Circuit's *Mozee* and *Luddington* decisions (finding no clear intent from statutory language and applying judicial presumptions), there is not necessarily a conflict in the holdings of these cases as to the applicability of the respective sections at issue.

Only § 101 of the Act is at issue in this case. It substantively expanded 42 U.S.C. § 1981 from covering only claims related to hiring or the creation of a new and distinct employment relationship to covering all claims of employment discrimination. The Seventh Circuit held § 101 should not be applied to cases already adjudicated and on appeal. As noted earlier, this case was not the first in the Seventh Circuit so holding. *Mozee* reached

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[3] *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991), held that 42 U.S.C. § 1988 (an attorneys' fee provision parallel to 706(k) in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)) did not permit recovery of expert witness fees. Thus, a party could only recover the standard witness fees avialable under 28 U.S.C. § 1821(b) (currently $40 a day). Therefore, the issue in *Davis* was whether she would recover $40.00 a day for the expert witness or the $12,200 requested.

the same conclusion a month earlier. (The appellate court decided *Luddington* on June 15, 1992, and *Mozee* on May 7, 1992.) Thus, *Luddington* is an application and a further discusison of the *Mozee* holding[6] and must be viewed in conjunction with it. When this is done, the holdings of the Seventh and Ninth Circuits can be analyzed so that they are not in conflict.

In *Mozee*, the Seventh Circuit looked at the language of the Act and its legislative history but did not find any clear intent as to whether its provisions were to be applied retroactively. *Mozee*, 963 F.2d at 932-34. The court then considered judicial presumptions on retroactivity and observed confusion existed among *Bradley v. School Bd.*, 416 U.S. 696 (1974) (finding presumption in favor of retroactivity), *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (finding presumption against retroactivity), and cases decided after each. The *Mozee* court noted it did not have the authority to choose between the two lines of Supreme Court precedents. It found the *Bowen* presumption against retroactive application to be the appropriate general rule[7] and that *Bradley* could be reconciled with it. *Mozee*, 963 F.2d at 935-36. In doing so, the Seventh Circuit relied on the post-*Bradley*, pre-*Bowen* decision of *Bennett v. New Jersey*, 470 U.S. 632 (1985). *Bennett* held that substantive provisions of amendments to the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241(a), *et seq.*, could not be applied retroac-

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[6] The Seventh Circuit noted it could have disposed of the retroactivity issue simply by citing its *Mozee* decision. *Luddington*, 966 F.2d at 226.

[7] Judge Posner agreed, noting that a component of the traditional concept of the rule of law is the idea that the law should confine its prohibitions and regulations to future conduct, so that persons can conform their conduct to it and thus avoid being punished. He found this concept was not absolute, but it was the right policy for courts to follow in the absence of other guidance. *Luddington*, 966 F.2d at 227-28.

tively. The Third Circuit Court of Appeals had concluded that they could be applied retroactively, citing *Bradley*. However, the *Bennett* Court noted that *Bradley* acknowledged limits to the general principle that a court is to apply the law in effect at the time of its decision. Citing *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982), it stated that limitation "comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Bennett*, 470 U.S. at 639. The Seventh Circuit, reading *Bradley* as limited by the language in *Bennett*, concluded that the distinction between the *Bradley* and *Bowen* line of cases was that statutory provisions impacting substantive rights and obligations cannot be applied retroactively.[8] *Mozee*, 963 F.2d at 936. This means that *Bradley* stands for the proposition that statutory provisions not impacting substantive rights and obligations can be applied retroactively.

The Act contains numerous provisions on a variety of matters, some of which are substantive and others which are not. Applying the section on expert witness fees involved in *Davis* to a pending case fits the *Bradley* exception to the *Bowen* presumption against retroactivity recognized by the Seventh Circuit. *Bradley* held that retroactively applying a provision for the award of attorneys' fees was appropriate. 416 U.S. at 721. Section 113 of the Act, allowing for the award of expert witness fees, is akin to a provision for the award of attorneys' fees. Thus, if the same issue were before the Seventh Circuit under its *Mozee/Luddington* analysis, § 113 (a provision not affecting substantitve rights) could be applied to pending cases, which was the holding in *Davis*.

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[8] Other circuits have relied on *Bennett* to reconcile *Bradley* and *Bowen* in a similar manner. *See Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898-99 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992).

Therefore, the holding of *Davis* that § 113 allowing recovery of expert witness fees can be applied to pending cases is not in conflict with the holdings in *Mozee* and *Luddington* that § 101 substantively expanding the scope of § 1981 cannot be applied to pending cases. Each conclusion is consistent under the Seventh Circuit's reconciliation of *Bowen* and *Bradley*. Thus, there is no conflict "on the same matter." Supreme Court Rule 10.1(a).

IV. IF A CONFLICT EXISTS BETWEEN DECISIONS OF THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT, THAT DOES NOT NECESSARILY MEAN THE COURT SHOULD GRANT THE PETITION.

A. The Court often denies Petitions when a conflict exists in the circuits.

While existence of a conflict between circuit courts of appeal can be a basis for granting a Petition for Writ of Certiorari, that does not mean the Court is required to accept this case for review. The Court frequently has denied certiorari when the Petitions were based on a conflict in the circuits. *See, e.g., Walker v. United States*, 113 S. Ct. 443 (1992) (Justices White and Blackmun dissenting) (certiroari denied despite a split in the circuits, and the Court had declined to review the same issue on three prior occasions); *Beaulieu v. United States*, 110 S. Ct. 3302 (1990) (Justice White dissenting and noting 48 instances during that term when Petitions based on circuit splits had been denied) (certiorari denied, despite a split in the circuits on the issue of reliance on co-conspirators' testimony for purposes of sentencing); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978), and cases cited therein (Justices White and Blackmun dissenting) (certiorari denied, despite a split in the circuits, on the issue of whether the failure of a common carrier to comply with the time limits of the Interstate Commerce Commission regulations estops it from collecting

freight charges from the shipper). Thus, granting the Petition is not required.[9]

B. Only one of numerous sections of the Act is at issue in this case, and other decisions involving a broader range of sections would be more appropriate to review than this one.

The Act contains numerous provisions, covering a variety of subjects. These include: expanding the substantive scope of 42 U.S.C. § 1981 [§ 101]; allowing recovery of compensatory and punitive damages for intentional discrimination under Title VII [§ 102]; allowing trial by jury under Title VII in cases of intentional discrimination [§ 102]; setting forth the burden of proof in disparate impact cases under Title VII [§ 105]; prohibiting the adjustment of scores, the use of different cutoff scores or otherwise altering the results of employment-related tests on the basis of race, color, religion, sex or national origin [§ 106]; providing that an unlawful employment practice is established if a plaintiff demonstrates that race, color, religion, sex or national origin was a motivating factor even though other factors also motivated the practice and identifying the available remedies in such circumstances [§ 107]; specifying under what circumstances a person may challenge an employment practice that implements or is within the scope of a litigated or consent judgment [§ 108]; extending coverage of Title VII to United States citizens in foreign countries [§109]; setting forth when the limitations period begins to run when challenges are made to allegedly discriminatory seniority systems [§ 112]; permitting the award of expert witness fees under Title VII [§ 113]; extending the limitations period in actions against the federal government [§ 114]; requir-

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[9] The issue of the Act's retroactivity will, after a period of time, become moot and, therefore, will affect a finite number of cases. The Court should not devote its limited resources to this type of case.

ing individuals who wish to bring an action under the Age Discrimination in Employment Act of 1967 to do so within 90 days after receipt of a notice that their complaint has been dismissed or otherwise terminated by the EEOC [§ 115]; and establishing rights for government employees including prohibitions against discrimination [§ 301, *et seq.*].

The issue in *Luddington* only involves whether one section of the Act [§ 101] should be applied retroactively. As noted earlier, no conflict exists between or among circuits on this specific issue. There are many other sections of the Act, and different results might obtain based on which particular section or sections are at issue. The Court should not grant this Petition. If the Court deems it necessary to address the Act's retroactivity, a case involving a broader range of sections would likely be more appropriate.

C. The context in which this case arose is narrow, and other decisions would be more appropriate to review than this one.

The issue in *Luddington*, as well as in the Ninth Circuit's *Davis* decision, is limited to whether one section of the Act should be applied to a case that has been adjudicated and was on appeal on the Act's date of enactment. A substantial number of cases have arisen or will arise under other fact patterns, such as cases tried after the effective date but i) filed before the Act's effective date and arising from conduct occurring before that date; ii) filed after the Act's effective date and arising from conduct occurring before that date; or iii) filed either before or after the Act's effective date and arising out of conduct that straddles the effective date. The Seventh Circuit noted in a subsequent case that *Luddington* left open the question of the Act's retroactivity to cases like these. *Banas v. American Airlines*, 969 F.2d 477, 484-85 (7th Cir. 1992). The Court may find it more appropriate to

wait until a Petition comes before it in which the case had not been adjudicated as of the Act's date of enactment.

D. Allowing one or more of the remaining five circuits the opportunity to address the Act's retroactivity could provide greater illumination of that issue.

Seven circuits have addressed the issue of the Act's retroactivity, but only one (*Davis*) has found that any of its sections should be applied retroactively based on its language. The remaining six circuits have not found the statute's language so abundantly clear (*see* cases cited *supra* p. 7). They based their conclusions that provisions of the Act should not apply retroactively on a review of its legislative history and/or application of judicial presumptions.

The Court should consider waiting until one or more of the remaining five circuits also rule on this issue. Those circuits likely will address the Ninth Circuit's *Davis* decision as well as the decisions of the other circuits. This will permit the opportunity for greater illumination on the issue of the Act's retroactivity if it needs to be resolved by the Court.

CONCLUSION

Luddington contends certiorari should be granted because of a conflict in the circuits as to the Act's retroactivity. However, he does so with little analysis and with arguments that are not articulated, are not the basis for granting a Petition or are incorrect.

Each circuit that has addressed § 101 of the Act has concluded that it should not be applied retroactively. Thus, the Seventh Circuit's decision in this case is not in conflict with any other circuit, and the Court already has denied certiorari in the Seventh Circuit case that is the predecessor to *Luddington*.

While the Ninth Circuit and the Seventh Circuit decisions differ as to the appropriate legal principle to apply in determining whether a statute is retroactive, the cases can be analyzed in a manner that the holdings are consistent.

Even assuming a conflict exists, the Court is not required to grant the Petition. It frequently denies Petitions that are based on splits in the circuit courts of appeal. Furthermore, the issue in both this case and the Ninth Circuit *Davis* case is limited to one specific section of the Act, and both decisions are limited to cases that had been adjudicated and were on appeal when the Act became effective. The Court should consider allowing other circuits who have not addressed the issue the opportunity to do so to provide more illumination on the issue. If the Court is to address the Act's retroactivity, future cases likely will be better suited for a grant of a Petition for Certiorari.

Respectfully submitted,

GREGORY J. UTKEN *
BAKER & DANIELS
Suite 2700
300 N. Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300
Counsel for Respondent

January 4, 1993

* Counsel of Record